

East Chicago Rehabilitation Center, Inc. and Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO. Case 13-CA-19196

January 8, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On June 16, 1981, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief to which the Respondent filed a brief in response. In turn, the General Counsel filed a motion to strike the Respondent's responding brief. Finally, the Respondent filed its exceptions in opposition to the General Counsel's motion to strike the Respondent's brief filed in response to the General Counsel's cross-exceptions.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions² of the Administrative Law Judge and to adopt his recommended Order.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, East Chicago

Rehabilitation Center, Inc., East Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make the below-named employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest, and WE WILL reinstate them:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Beard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
Bula Clinton	Jeff Veal
Joyce Hathaway	Eloise White
Mary Hardy	Stella Williams
Annie Pugh	Eula Woods

Jurline Woods

EAST CHICAGO REHABILITATION
CENTER, INC.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed on October 15, 1979, by Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called Charging Party or Union. A complaint thereon was issued on April 24, 1980, alleging that East Chicago Rehabilitation Center, Inc., herein called Employer or Respondent violated Section 8(a)(1) of the Act by suspending and discharging 17 employees for engaging in an economic strike.¹ An answer thereto was

¹ The General Counsel's motion to strike the Respondent's responding brief is denied as lacking in merit.

² The Respondent contends that the strike caused disruptions in patient care and the employees therefore sacrificed the protection of the Act. We disagree. The walkout involved fewer than half of the day-shift employees, with the remaining employees and supervisors working as scheduled. The strike lasted only 2 hours. Although some patient care schedules were not completely adhered to, there is no showing that the strike jeopardized any patient's safety or health. We find the employees did not lose the protections afforded health care employees under the Act. Further, once the strikers offered to return to work they could not be held responsible for any subsequent interruption in normal patient servicing. In particular, the strikers cannot be held accountable for the Respondent's refusal to take them back, nor for the cutback in physical therapy for 3 days. Anything that occurred after the employees offered to return was the Respondent's sole responsibility and is irrelevant to the strike.

In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth in that opinion.

³ The Respondent requested an opportunity to argue its case orally before the Board. In our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties. Accordingly, we deny the Respondent's request for oral argument.

¹ The complaint was amended at the hearing to allege the status of Metta Stone as a supervisor.

timely filed by Respondent and pursuant to notice, a hearing was held before me in Chicago, Illinois, on October 22 and 23, December 8, 9, and 17, 1980. Briefs have been timely filed by General Counsel and Respondent, which had been duly considered.

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

The Employer is an Illinois corporation with a place of business located in East Chicago, Illinois, where it is engaged in the business of providing extended nursing care. During the past calendar year, Respondent, during the course and conduct of its operations, derived gross revenues in excess of \$100,000, and also purchased and received goods valued in excess of \$5,000 directly from points outside the State of Illinois. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

While the status of the Union as a labor organization is not specifically alleged, it is undisputed that the Union, the recently certified collective-bargaining representative of the employees, is acting in that capacity, and has negotiated a contract on behalf of the unit employees. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Employer is a 24-hour skilled nursing care facility employing about 100 employees and serving about 116 patients. After a Board-conducted election, the Union was certified on December 11, 1978, as the collective-bargaining representative for a unit of service and maintenance employees.

Thereafter, a series of some 12 negotiating sessions took place in an effort to achieve a collective-bargaining agreement. The Union was represented at all of these bargaining sessions by Union Business Agents Wallace Evans and Arthur Primm. In addition, there was a three-member employee negotiating committee with two alternate members. Pursuant to an understanding with the business agents, the negotiating committee members did not participate directly in the negotiations but communicated with the business agents who actually conducted the negotiations. While all of the negotiating committee members except Jurline Woods attended at least some of the negotiating sessions, none of them attended the last three sessions conducted on May 23, June 11, 18, 1979.² Respondent was represented at all the negotiating sessions by Dr. Jerry Henderson, part owner of the facility and member, along with five others, of the facility's board of directors, and Steven Sanders, the administrator of the facility. Sanders, however, was not present at all times during all sessions due to other matters requiring his attention from time to time. During earlier sessions, a

management consultant named Renee Stein participated on behalf of Respondent. Beginning with the May 23 session, another consultant named Dominic Licata represented Respondent.

Respondent sought a contract provision providing some overlap in shift hours in order to exchange information and smooth the transition between shifts. At the June 11 session, while discussing the shift lengthening proposal, other proposals were made by the Union, including certain proposals with a view towards extending the lunch period from one-half hour to 1 hour, with two 15-minute breaks. During this discussion it appears that Licata learned for the first time that employees of the facility were being permitted to leave the premises during the one-half hour paid lunch then in effect. Licata advised Henderson that Respondent was liable under workmen's compensation regulations for accidents to employees during this lunch period even while off Respondent's premises, because the one-half hour lunch was paid time. Licata also told Henderson that something would have to be done about the problem. Upon being so advised, Henderson, apparently accepting this advice as accurate, expressed the view to both Evans and Primm that the practice would have to be stopped and that it was his intention to bring the matter to the attention of Respondent's board of directors for resolution. The Union, for its part, conceded that the liability of Respondent existed, but both Evans and Primm cautioned Henderson that any precipitous corrective action at this time would be unwise, particularly since they were close to an agreement on a contract.³

As he had indicated at the June 11 session, Henderson did bring the matter to the attention of the board of directors on June 13. At this time, a decision was made to divest the facility of the presumed liability by ending the practice of employees being permitted to leave the premises during the one-half hour lunchbreak. Henderson then directed Sanders to prepare a memo to the employees so advising them. Sanders prepared the following memo dated Friday, June 15, 1979:

May I take this opportunity to communicate and share with you one of the many concerns encountered by the Rehab.

The East Chicago Rehabilitation Center currently engages the services of over eighty employees, all of whom enjoy a list of benefits; the expenses of which, are borne primarily by the facility.

Please Note:

Breaks and meal periods are fringe benefits paid solely and exclusively by our employers.

² All dates refer to 1979, unless otherwise indicated.

³ Respondent contends that the evidence shows that the Union's representatives agreed to the elimination of the one-half hour paid lunch on June 11, citing primarily the testimony of Henderson. However, my review of the testimony of all the participants at the June 11 session convinces me that Henderson's account of the June 11 session is confused and often contradictory, and I am persuaded that the Union did not agree to the elimination of the paid one-half hour lunch period.

Because of this fact, the Rehab is liable and accountable for you under Workmen's Compensation during these periods.

It has been the PRACTICE of the Center to allow employees to leave the facility during meal periods and break periods.

This is both ill advisable and unfortunate.

If any employee is injured while out of the facility on company time (break, lunch, etc.) the employer is liable for that employee and may be subject to unnecessary legal action.

As you can see, this places Rehab on unsteady ground.

In a serious attempt to avoid involvement in needless litigation, it will be needful to implement the following Policy:

Effective June 18, 1979 it will be NECESSARY and MANDATORY that all employees enjoy their lunch and break periods on the PREMISES of East Chicago Rehabilitation Center.

Failure to comply with this policy will result in Immediate Termination.

Please recognize, we are aware and mindful of your needs as an employee and are presently researching the possibility of a Food Service which will be accessible to all personnel during all shifts. However, until then, may I present to you a list of restaurants that provide delivery service.

Barton's Pizzeria	Chez Toni's Pizza
932-333	397-9009
Leonardo's Pizzeria	Pizza Pat
397-7711	931-2240
Mehilo's Pub	Papa B's Red Onion
398-9837	Pizzeria 844-1234
Ralph's Pizzeria	Iggy's
398-6119	397-4141

Also, remember our dietary service is available until 7:00 P.M. and bringing lunches from home as individuals or as a group has historically exemplified Americanism.

If you have any questions concerning this policy, please contact your immediate supervisor who is knowledgeable and capable of answering your questions.

The above memo was distributed to the employees at the facility, with their paychecks, beginning about 7 a.m. on Friday, June 15.⁴ Many of the employees were disturbed by the memo and feeling thus aggrieved, met with Metta Stone, nursing supervisor. Apparently not assuaged, some 10 to 20 employees thereafter went to the office of Sanders, who met with them about 8:15 a.m. in the dining room, along with several other late arrivals for a total of between 30 to 40 employees. Sanders explained the matter of the facilities off premises lunch liability, but stated that he would try to have the change delayed. Still dissatisfied, a number of the employees punched out and left the premises, causing substantial

disruption in the normal operations of the facility and creating serious patient care problems.

About 10 a.m., employee Rebecca Brown called Primm and told him that the employees were walking out. She told him about the paychecks and memo. Primm asked her to try and hold the people from walking out and to ask them to please wait until he got there. Brown told Primm that she was trying to stop them. Primm told her that he would be over right away and he arrived about 10:15 a.m. Several employees outside the facility were asked by Primm to go inside with him. Once inside, Primm met with Henderson and asked for permission to use the conference room to talk to the 10 employees, and Henderson agreed.

The meeting took place, attended by some 23 to 26 employees. Evans, having been contacted at Primm's request by the union secretary, arrived about 10 minutes after the meeting began with some three or four more 15 employees that Evans had met outside the facility and brought in with him. The employees complained about the memo and not being able to leave the premises for lunch. Primm explained the matter of Respondent's liability and told them that the Union was attempting to work out the problem in contract negotiations. Both Evans and Primm explained that it was not proper to leave the facility and that there were Federal laws which governed the matter. Evans and Primm told them that the Union did not condone or approve of the walkout and asked if they would be willing to go back to work. The employees agreed to return to work at which point Evans and Primm went to seek out Henderson.

About 10:30 a.m., they located Henderson and Sanders in Sanders' office. Evans told Henderson that the Union had not called the strike, did not condone the strike, and did not agree with the strike. He expressed surprise that the lunch hour change had already been announced and that they had hoped that it would not have been done because it was going to make a contract hard to sell. Henderson said that the board of directors wanted to stop the practice and that the change had to be made. Evans told Henderson that the people were ready to return to work and that the Union would appreciate their being put back to work. Henderson responded that the situation was very serious and that he would have to consult with the board of directors in deciding what action to take as to the 17 employees who had participated in the walkout. Henderson told Evans that the employees were to go home for the day and that they were being suspended subject to a determination by the board of directors as to their terminations. The meeting ended and the employees left the premises. On the evening of June 15, Sanders sent mailgrams to the 17 striking employees advising them that they were being suspended indefinitely pending a review by the board of directors.

The board of directors met on Wednesday, June 20, and decided that discharge was the appropriate discipline for having engaged in the walkout and leaving patients unattended on June 15. On the same date, June 20, mailgrams from Sanders were sent to the employees advising them of their terminations, "for the reasons that on June 15, 1979 you walked off your job and left the building

⁴ It is undisputed that the Union was not advised or consulted concerning this decision.

and otherwise abandoned your employment without just cause and in violation of applicable laws."

On June 18, the parties met in another negotiating session. The Union again solicited Henderson to try to get the employees returned to work. This effort was not successful. However, the parties were successful in reaching agreement on the terms of a contract which became effective on June 28, 1979. This contract included provisions for a one-half hour unpaid lunch, two 20-minute paid lunchbreaks, and a shift overlap of 30 minutes.

B. Discussion and Analysis

The facts of this case raise the basic issue of whether the employees who participated in the walkout on June 15 were engaged in protected concerted activity. Respondent contends that they were not, on various grounds. First, Respondent contends that the failure to give written notice, as required under the provisions of Section 8(g) of the Act,⁵ had the effect of depriving the walkout of any status as protected activity that it might have otherwise enjoyed. I do not agree.

In reviewing the facts of the instant case, it is clear that the basic problem giving rise to the walkout, i.e., the prohibition against employees leaving the premises during lunchtime, was not raised until the bargaining session of June 11 when it was raised by Licata.

At this session, the Union did not agree with Respondent to any change in Respondent's lunchtime practice which had permitted employees to leave the premises. All that the Union did was to express the view, in agreement with Respondent, that Respondent liability existed.⁶ It was Respondent's board of directors who took the *unilateral* action of prohibiting employees from leaving the work premises during lunchtime.⁷ As noted above, this was done by written notice with the paychecks of the employees on Friday, June 15, to become effective on Monday, June 18. This change was made without notice to the Union who had in fact cautioned against precipitous action being taken by Respondent at the June 11 meeting.

Upon being notified on June 15 of the change, the employees became agitated and disgruntled. After receiving no satisfactory response in meetings with Respondent, 17 employees walked out in protest.

There is no evidence that the Union had any prior notice of the walkout. Clearly, the Union was taken by surprise by the events of the morning of June 15. The

Union was not aware that the strike had begun until it was so advised by an employee after the walkout had occurred. Thereafter, both Evans and Primm went to Respondent's facility, met with the employees, told them that they were wrong in striking, that the Union did not condone the strike, and exacted from the employees an agreement to return to work.

Thereafter, Evans and Primm met with Henderson and Sanders, told them that the Union did not condone the strike, and asked Respondent to allow the striking employees to return to work. This request was rejected by Respondent and the employees were suspended and subsequently discharged.

It is clear that the Union did all that it could after learning of the walkout to end it. Within about 2 hours, it had an agreement from the striking employees to return to work. Since Respondent rejected this, any deleterious effect that the strike may have had thereafter was assignable to Respondent, not the Union.

In these circumstances, it would not have been possible for the Union to have given the 8(g) notice contemplated by the Act since it had no prior notice of the walkout. Accordingly, I find that the Union's failure to provide such notice did not deprive the walkout of its protective character. Nor did the failure of the employees to provide 8(g) notice, render the walkout unprotected. The notice requirements of Section 8(g) run to the Unions, not employees, and the failure of employees to give such notice prior to striking a health care institution does not deprive the strike of its normally protected character. *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977); *Montefiore Hospital and Medical Center*, 243 NLRB 681 (1979), *enfd.* 621 F.2d 510 (2d Cir. 1980); *Villa Care, Inc., d/b/a Edmonds Villa Care Center*, 249 NLRB 705 (1980).

However, Respondent also contends that the action of the employees in striking was in derogation of their collective-bargaining representative, and that therefore the striking employees are not entitled to the protection of the Act.

An examination of the facts herein discloses that after its certification on December 11, 1978, the Union and Respondent engaged in negotiations for a first contract. On June 11, the matter of Respondent's liability for employees leaving the premises on paid lunchtime was raised for the first time. No employees attended this negotiating session and there is nothing in the record to indicate that any of them were even aware that the subject was under discussion, and the Union did not agree to any change in the existing policy. Obviously, the Union and the employees were not taking inconsistent positions on this issue, and it was in this posture that the matter was brought to the attention of the employees on Friday, June 15, when they were notified of the change in policy becoming effective on the following Monday.⁸

On these facts, Respondent's "derogation" argument cannot be sustained. First, the position taken by the

⁵ Sec. 8(g) of the Act reads:

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

⁶ Whether such liability actually existed, as a matter of law, was never established.

⁷ For whatever reason, no 8(a)(5) violation was alleged as to this unilateral change, and no finding of a violation is made herein.

⁸ While there may have been other matters causing discontent among the employees, which were expressed by them in meetings on June 15, it is clear that Respondent's action which precipitated the walkout was the newly announced ban on leaving the premises at lunchtime.

Union at the June 11 negotiating session was not inconsistent with the position expressed by the employees by walking out. The Union and Respondent had not negotiated any agreement to end the practice.⁹ It was a unilateral change undertaken by Respondent, and it was essentially to protest this unilateral change that the employees took the strike action. Moreover, on a basis of this record, it does not appear that the employees who struck were even aware that the matter had been raised for discussion at the June 11 meeting. These facts do not describe any "derogation" theory so as to strip the employees of their status as economic strikers.

Nor, on the facts of this case can the walkout by the employees be construed as an effort on the part of the striking employees to seek separate bargaining with Respondent despite the existence of their collective-bargaining representative. The walkout was simply a spontaneous reaction to Respondent's unilateral action in changing a term of their employment, without prior notice or consultation with either the employees or their collective-bargaining representative. As noted earlier, the striking employees were not even aware that the basic issue that they were protesting had even been raised in collective bargaining. Certainly such employee activity cannot be construed as an effort to seek separate bargaining. And, so, is obviously factually distinguished from the governing principle set forth in *Emporium Capwell Co. v. Western Addition Community Organization, et al.*, 420 U.S. 50 (1975).

Respondent also makes the argument that, apart from notice requirements of Section 8(g), striking employees should not be entitled to the protection of the Act inasmuch as their actions resulted in patient neglect, and as a matter of public policy is repugnant to the Act. However, apart from the restrictions imposed upon unions by the requirements of Section 8(g) of the Act, there is nothing in the Act which imposes greater restrictions on the activities of employees in the health care industry than employees of any other industry subject to the jurisdiction of the Act. *Montefiore Hospital and Medical Center, supra*.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the

⁹ One could argue that since the Union conceded Respondent's liability, it would have been sympathetic to any change in the practice, but this is speculation in which I am not disposed to indulge, and is not tantamount to agreeing to the change in practice.

Act. I have found that Respondent suspended and discharged employees for reasons which offended the provisions of Section 8(a)(1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided herein with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁰

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging employees for having engaged in protected concerted activity, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹¹

The Respondent, East Chicago Rehabilitation Center, Inc., East Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former jobs to:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Beard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
Bula Clinton	Jeff Veal
Joyce Hathaway	Eloise White
Mary Hardy	Stella Williams
Annie Pugh	Eula Woods

Jurline Woods

¹⁰ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

If those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings they may have suffered due to their suspension and discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports and all other records necessary to analyze the amounts of backpay due herein.

(d) Post at its facilities in East Chicago, Illinois, copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms to be provided by the Regional Director for Region 13, after being duly signed by Re-

spondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."